SUPREME COURT, U. S.

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NO. 389

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

CONTINENTAL NUT COMPANY,
Petitioner,

vs.

ROBERT L. BERNER COMPANY,
Respondent.

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION

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The question sought to be presented by our petition for writ of Certiorari was: "Whether it is proper to apply a state or federal test of sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship" (Petition, p. 2). Respondent does not deny that this question is an important one which has not been, but should be, decided by this Court. Moreover, respondent admits that the evidence found below to be inadequate to support the jury's verdict under Illinois law would have supported a verdict under federal law.* Despite this explicit concession, however, respondent repeatedly contends that the critical question in this case is not one of sufficiency of the evidence at all (Resp. Brief, pp. 4, 6, 10), but "whether there was any evidence of spe-

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* Respondent states (Brief, p. 13); "(T)here is no question that if petitioner's view prevails, the type of evidence it introduced would have entitled it to a verdict in the district court."

cial damage as state law defined that element" (*Ibid.*, p. 4). This is so, they say, because "until special damage has been shown, the words are not actionable at all" (*Ibid.*, p. 7).

The obvious purpose of this line of argument is to create the impression that the Illinois requirement of a showing of special damage in libel *per quod* cases somehow establishes an additional substantive requirement which does not exist in other kinds of lawsuits in which evidence of the nature submitted here has been held under federal standards to be sufficient as to damages to support a verdict. There is no merit in this contention. As respondents have themselves recognized, special damage is simply damage which must be specially proved (Deft. Brief, U.S. Ct. App., pp. 13-17). Some libelous statements are "so obviously and naturally hurtful to the person aggrieved that proof of their injurious character can be, and is, dispensed with." *Reed* v. *Albanese*, 78 Ill. App. 2d 53, 58, 223 N.E. 2d 419, 422 (1st Dist. 1966). On the other hand, some words are not so obviously harmful, and proof of their harm cannot be dispensed with. In such cases, where damage is not a "necessary consequence" of the offending language and where damage cannot simply be inferred without any evidence, then the defamed party must produce evidence of "special damages"—must show, in other words, that he was actually damaged by the publication. *Davis* v. *Ferguson*, 246 Ill. App. 318, 333 (3rd Dist. 1927).

In this respect, the Illinois law of libel *per quod* is no different as to damages than the federal law respecting anti-trust violations. In anti-trust cases, as in cases of libel *per quod*, the plaintiff must show that he has been injured by the defendent's improper conduct in order to recover

damages.* As the Court of Appeals for the D.C. Circuit held in *Association of Western Railways* v. *Riss & Company,* 299 F.2d 133 (1962), a case arising under the anti-trust laws (299 F.2d at 135):

> "Section 4 of the Clayton Act allows treble damages, and costs including an attorney's fee, to a person who is 'injured in his business or property by reason of anything forbidden in the anti-trust laws,' 15 U.S.C.A. 15. The *'gist of the action is* not merely the unlawful conspiracy . . . but is *damage to the individual plaintiff* resulting proximately from the acts of the defendant which constitute a violation of the law.' *Glenn Coal. Co.* v. *Dickinson Fuel Co.,* 4 Cir., 72 F.2d 885, 887. *Keogh* v. *Chicago & N.W. Ry.,* 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183; *Hunter Douglas Corp.* v. *Lando Products, Inc.,* 9 Cir., 235 F.2d 631. The finding that the conspiracy had not damaged the plaintiff was therefore a finding that the plaintiff had not proved its claim." (emphasis supplied)

Thus, in both libel *per quod* actions and actions arising under the anti-trust laws, once evidence of damage has been introduced and a verdict rendered, the question is whether the evidence is sufficient to support the verdict; and this question must be decided under either state or federal law. Here, the district court and court of appeals decided that question on the basis of Illinois law. Yet it is uncontroverted that had the question of sufficiency of the evidence been decided under federal law, the jury's verdict should have been sustained. *Bigelow* v. *RKO Radio Pictures, Inc.,* 327 U.S. 251 (1946); *Story Parchment Co.* v.

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* The distinction between libel *per se* and libel *per quod,* relied upon by respondent (Resp. Brief, p. 13) is misplaced, for it is the libel *per se* cases that are different from the general run of tort cases in that in the libel *per se* cases, no showing of damages is required.

Paterson Parchment Paper Co., 282 U.S. 555 (1931); and see other cases cited in our Petition; pp. 13-14.

No dispute is presented by this case as to the definition of any of the substantive elements of libel *per quod* under Illinois law, including the element of "special damage," since petitioner did not seek to dispense with proof of damages by simply inferring damage from the words of the publication alone. Instead it sought to, and did, show that the bulletin in question resulted in actual damage in the form of loss of business and a drastic decline in profits.

Respondents do not now deny that petitioner submitted evidence of special damage to the district court (Resp. Brief, p. 11):

> "We do not, of course, mean to suggest that no evidence of dollar loss was submitted by the petitioner in the district court. *Some was*" (emphasis supplied).

Petitioner submitted expert testimony of the injurious character of the publication. Petitioner also showed that in the year respondent published its defamatory bulletin, petitioner's net operating profits were reduced by over $160,000 (see Petition, p. 7). In that same year, petitioner was left with unsold Brazil nuts which, if sold, would have produced net profits of $254,064 (*Ibid.*, p. 7). Petitioner also showed that the year the libel was published, it lost 92 customers, or 23.9% of its business; and that it lost 51 more customers, or 13.2%, the next year (*Ibid.*, p. 8). Other evidence comparing the net sales and gross profits of petitioner's company with that of respondent was also introduced (*Ibid.*, p. 8). It was further shown that the libelous bulletin was given widespread publication, that several of petitioner's own brokers saw copies of the bulletin in their selling territories, and that they lost customers as a consequence (*Ibid.*, p. 7). Thus, given such evidence, there can

be no question that some evidence of special damage was introduced by petitioner; the only remaining question was whether the judge correctly relied on the Illinois law of "sufficiency" in determining that such evidence was insufficient to support the jury's verdict for petitioner.

Unlike respondent, both courts below certainly saw the issue as one of sufficiency of the evidence. The district court at one point held that "the evidence introduced by plaintiff *would probably be sufficient* to support a verdict in some cases of libel *per quod*" (Petition, App. B, p. 29) (emphasis supplied). But the district court decided that Illinois law required a stricter standard of sufficiency where, as here, the petitioner had a list of its customers and their addresses. The Court of Appeals likewise believed the issue to be one of sufficiency of the evidence; and it decided that question under state law (Petition, App. A, p. 19):

> "The main contested issue presented by plaintiff's appeal is whether the plaintiff made such proof of special damages as is required *under Illinois law* to sustain a verdict for actual damages and punitive damages in a libel *per quod* action" (emphasis supplied).

The Court then criticized the damage evidence introduced by petitioner for "its insufficiency to establish what actual monetary damage may have been sustained" (*Ibid.*, p. 22). According to the Court, petitioner failed to meet the standard of sufficiency established "under the theory of the Illinois *per quod* decisions," in that it failed to show "the loss of profit attributable to patronage withheld by the particular customer and that such withholding was the result of the publication" (*Ibid.*, p. 23).

The Court of Appeals' decision in the previous appeal in this case, reported at 345 F.2d 395 (1965), makes it

clear beyond any doubt that the question below had to do with sufficiency or insufficiency of the evidence of special damage. That first appeal grew out of the district court's dismissal of our complaint, *inter alia,* for "failure to plead special damages with sufficient specificity" (345 F.2d at 397). The complaint had alleged a decline in gross sales and receipts following the publication of respondent's defamatory publication (*Ibid.,* p. 397). The Court of Appeals reversed, holding that "plaintiff sufficiently alleged specific damages" (*Ibid.,* 397).* The case thereupon was sent back to the district court, where the question was no longer whether special damages had been sufficiently alleged, but rather whether the allegations of special damages were sufficiently proved. Despite a jury verdict for petitioner, the district court held that under Illinois law the evidence was insufficient to support the verdict. The Court of Appeals affirmed, also on the basis of the Illinois standard of proof.

By contrast, under the federal standard of proof, as stated and applied in the *Bigelow* and *Story Parchment* cases, *supra,* the evidence of damage introduced by petitioner would have been sufficient to sustain the verdict favorable to petitioner. Respondent makes no effort to distinguish these cases, nor could they be distinguished on the theory urged here by respondent, for the federal law involved in those cases, no less than the state law involved here, unquestionably required a showing that damages had

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* This holding by the Court of Appeals renders untenable petitioner's present contention that "Proof of a general decline in sales is not . . . relevant to the proof of special damage." (Resp. Brief, p. 4)

actually been sustained as a result of the wrong complained of.*

Thus, the question not decided in *Dick* v. *New York Life Insurance Co.*, 359 U.S. 437 (1959), and *Mercer* v. *Theriot*, 377 U.S. 152 (1964) is squarely presented here. It is whether, the jury having found for petitioner, it was proper for the judge to grant judgment not withstanding the verdict by applying a state, rather than federal, test of sufficiency of the evidence to support the verdict. As we pointed out in our Petition (pp. 11-13), the Courts of Appeals are in conflict on this question.

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* On the question of what federal law would require, respondent relies exclusively upon *Erick Bowman* v. *Jensen Salsbery Laboratories, Inc.*, 17 F.2d 255 (8th Cir. 1926). (Resp. Brief, p. 7). That case predated *Erie RR.* v. *Tompkins*, 304 U.S. 64, (1938), and dealt with the question of what must be alleged in a complaint under the federal common law of libel, rather than the federal law as to what evidence is sufficient to show special damage. Moreover, the Court of Appeals for the Seventh Circuit, in the previous appeal in this case (345 F.2d 395, 397), specifically "declined to follow the rigid rule of *Erick Bowman* . . . that generally a complaint seeking special damages . . . should specifically allege by name the customers claimed to have been lost." (Petition, App. A., p. 19)

In the light of the Seventh Amendment's guarantee of the right of trial by jury, this conflict should now be resolved by this Court.

Respectfully submitted,

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